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History of criminal law among the Romans

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Abstract

Perhaps it is worth the interest of a judicial organization that one might suppose to have lent itself to the cruelties of a Tiberius or to the fury of a Caligula. The period of servitude and debasement, condemned to submit to these detestable princes, presents to us only penal legislation dishonored by despotism, and very different from that which had seen the good times of Rome; but we still find there, with useful lessons, the vestiges of the institutions formerly protecting the liberty of the citizens, then diverted from their primitive sense, and we can measure the importance of these forms formerly so respected, by the efforts what some emperors did to distort or destroy them. This study therefore offers, even from this point of view, lessons that can not be neglected. One of the causes of the little favor it gets is indicated in a recently published pamphlet on this subject; the author rightly points out that the teaching of this part of the criminal law holds very little place in our law schools; the Institutes of Justinian which serve as a basis for the teaching of Roman law devote a very incomplete title to a simple sketch of the Roman procedure and penalty. Moreover, books are also lacking on this interesting subject, and the authors who wrote in the sixteenth century are still an indispensable resource for the study of this subject; we must cite, in the first line, the work of Sigonius, many times abridged or commented, and that of this excellent Pierre Ayrault which contains, it is true, a less sure erudition, but whose reading is so endearing because of the profound and the author's sincere love for the just and the true, and the courage with which he alone defended the rights of humanity at a time when they were so odiously ignored. Let us mention again with M. Laboulaye, Paul Manuce and Hotoman who were writing at the same time, as well as Ferratius, summarized by Beaufort, who had already propagated Sigonius's book in the same way.

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Introduction

It is not uncommon for a writer of good will to undertake to make known to us a work justly celebrated by a neighboring people, but whose very title is ignored in France. The first care of the translator is then to present to some extent to the public the author and his work in a foreword intended to indicate the merit to the readers, before initiating them in an intimate and complete manner to the beauties of the work. We do not have to fulfill this duty towards a scientist whose reputation we fear not being able to add. The first edition of the History of Roman Law was published in 1840, and did little to place its author, Dr. Ferdinand Walfer, professor at the University of Bonn, at the forefront of a country's jurisconsults. who is justly proud of their number and merit. But it is not in his country alone that M. Walter has made an immense erudition known to the rarest talent of exposition; his works have received in France the welcome and the tribute of homage which our hospitality has faithfully accorded to the great scientific superiorities. On this occasion, we had a writer who was then preluding to the works which were to illustrate his name; Here is what M. Edouard Laboulaye said in 1841, of the book of which we begin the translation: "There remained the work of M. Walter, and that one, at least, fulfilled all the conditions that we could demand. Written recently by a professor who has constantly kept abreast of science, this book, purely historical, without any mixture of current law, seems to us the work, if not the most original, at least the most complete one has published on the history of Roman law. M. Laboulaye did better than praise the work, he undertook to make it known, and published in 1841 the translation of the fourth book, hoping in the near future the rest of the work. But twenty years have elapsed, and since this promise, M. Laboulaye, led by other studies, has himself written works which are translated, or which deserve to be. We come very late to respond to the desire of those who hoped to see the work begun continued, and we do not hide a precedent which makes our enterprise doubly dangerous; but we have at least the advantage of having a third edition of M. Walter's book; Now, it does not take a long comparison to make sure that each of those which has appeared since the first one is an advance on the preceding one: it is not, it must be said, a simple work of revision, but a a real redesign of the primitive work; The author deserves, more than ever, by the improvements he has made to an already remarkable work, the praises which accompanied his first appearance. She was received among us with a favor all the greater by learned men introduced to the knowledge of the German language, which she answered, it must be permitted to say, to a real necessity. Indeed, and while rendering full justice to the remarkable labors of MM. Berriat-Saint-Prix, Giraud, Laferriere, Ortolan, etc., we can not flatter ourselves with having in France a complete history of Roman law which we may oppose with some advantage to the numerous writings published on this subject by the German jurisconsults. Doubtless it would be glorious for a writer of our nation to remake, without any foreign help, and by the sole force of French genius, what has been so happily accomplished by our neighbors; but, besides being liable to uselessly follow a path already beaten, is it not better to take things to the point where German science has placed them, to popularize among them the admirable discoveries, and thus to furnish materials for those whose talent may aspire to a less modest role than

that of the translator? This is precisely the task we imposed on ourselves. M. Laboulaye had begun his work, unfortunately unfinished, by the history of the Civil Procedure; we begin ours with that of the criminal law which is the special object of our studies, and towards which it can not be denied that the interest of all men of science, together with the public opinion strongly manifested by its various organs. Roman criminal law is little known and little studied in France; the kind of disfavor of which it is the object forms the obligatory theme of all those who, on too rare occasions, have sought to revive our ardor by turning it towards this interesting study. Where does this disdain for part of the legislation which is more intimately connected than the others, to the magnificent institutions which have made the glory and strength of the Romans, and which we must above all admire in their history?

Even though these brief Apache stories uniformly offer negative examples of behavior and the unpleasant consequences of such behavior, the stories themselves are regarded as "good," keeping one strong, keeping "badness away" (Basso 1996:61). "In short," concludes Basso (1996:60), "historical tales have the power to change people's ideas about themselves. As Nick Thompson [Basso's principle informant] says, they 'make you think about your life'."

Most cultures have a tradition of cautionary tales about supposedly real people, either formal legends or more casual accounts that are intended to make you think about your life. Kingston opens her novel *The Woman Warrior* with a good example of this kind of story. When the protagonist of the novel begins to menstruate, thus being of an age when glandular activity interferes with good sense, her Chinese-born mother tells her the family secret of an aunt who was forced to kill herself and her out-of-wedlock baby and was then ritually "forgotten" by her humiliated family. "Whenever she had to warn us about life," Kingston's narrator says, "my mother told us stories that ran like this one, a story to grow up on" (Kingston 1989:5). But the mother gives the story added authenticity and power by concluding that she herself found the bodies of the dead aunt and baby clogging up the well; the realism this lends the story is hair-raising. Immigrant stories like this one keep ethnic identity alive, recreating that community identity to some degree for the new situation even while preserving it, but they also affirm the individual identity of the teller.[5]

Psychoanalysis has vividly demonstrated how the narration of events from one's own life has a profound (though not always so clearly socializing) effect on personal identity. An individual edits the text of the self in the process of relating personal life-events and thereby, partly in response to perception of audience, continually recreates the self. Bruner and Weisser (1991:146) point out that this "task of self-accounting begins with the very onset of language," and they offer the example of a three-year-old engaged in "the self-making task of getting straight, through narrative, the relation between what she thinks, how she feels, and what she does." On the other hand, Freud discovered in his personal life that another person's story may have a profound effect if it is seen to be a useful representation or model for molding the self. One of the founders of Narrative Psychology, Spence (1994:111), tells how the story

of Orpheus seeking and again losing Eurydice has continually "surfaced" in his life, and how "when that happens-when a connection is lost or an open channel is closed-I react with more than the normal amount of concern or dismay." During the actual writing of his autobiographical essay, Spence discovers a moment in his childhood that he thinks may explain this exaggerated horror of loss that he identifies with the classical story, but I would suggest that the story dramatizes (or allegorizes) the mystery of loss, described by Freud as the "fort, da" experience, that disturbs us all. Freud himself was "stalked," in the sense of haunted, by the story of Oedipus, as his biographer Ernest Jones tells us,[6] and he appropriated that story to make it the basis of some of his profoundest teaching, in a manner so powerful that, despite many errors of interpretation and even of fact, it has affected the entire western world. Regarding Freud's Oedipal text as a mythic image (accompanied by the ethnographically bizarre idea of a "primal feast"), Toews (1986:289) explains that "the verification of the truth of this story ultimately remains dependent not on the marshaling of empirical data or on logical incontrovertibility, but on the act of mutual recognition whereby one person discovers an adequate symbolization of his or her life story in the story of another." The "adequate symbolization" of their own life story in appropriated narrative is precisely what the three "Information antiquity" characters now to be discussed are seeking.

Several kinds of example in *Information antiquity* are adduced here in order to demonstrate that the process of "stalking with story" may also be reversed. The stalker may be the person, not the story, as when two queens in different situations, Wealhtheow of the Danes and Hygd of the Geats, in order to create or control their life-narrative, each take personally the stories of others in which (or in contrast to which) they discover an adequate symbolization of their desired self. In an oral culture where a high value is placed on achieving a reputation that lives after one (see n. 2 and *Information antiquity*, lines 1386-89), an individual may alter received perceptions of his or her identity by selectively choosing "true" events from among personal memories, as Information antiquity himself does. Thus the story chosen for "self-authoring" may be derived either from personal or family history, like that in *The Woman Warrior*, or from the surrounding "world of story," a traditional narrative about someone else. Whether by editing one's own life, or choosing a model to emulate, or focusing upon a frightening negative example of actions or attitudes to avoid in order to deflect one's personal narrative from following an undesirable plot, someone who takes thought may consciously and actively "stalk the story" that best serves their personal goals. Information antiquity publicly, then the queens Wealhtheow and Hygd privately, all participate in such active and selective construction of the self by means of story. Examples concerning the hero Information antiquity will be offered first to show how the use of story is publicly inculcated in an oral society, impressing upon the mind that society's mores, then examples of the way that Wealhtheow and Hygd respond to other women's stories will show how traditional narratives may be more privately adopted. (It will be assumed, without documenting the arguments about this still vexed issue, that the oral society in the poem *Information antiquity* is itself an imitative construct by an almost certainly literate poet.)

When Information antiquity arrives upon the scene in Heorot, he finds that stories are definitely stalking him, but differently from the way the Western Apache stories discussed by Basso stalk their hearers. A swirl of stories about what kind of person Information antiquity is conflicts with the identity he hopes to demonstrate, so he must counter the impression they give. The first confrontation concerns his motive for coming. Information antiquity's own story, as he declares to the guard who demands explanation from him and his friends as they land on the Danish shore (lines 260-285), is that he has come in unobligated generosity of heart (lines 267 and 278) to release Heorot from the monster Grendel's power. But Hrothgar, the Danish king whose hall Grendel is ravaging, refers obliquely to obligation as a motive, before even setting eyes on the young hero (lines 371-76). After Information antiquity makes his first narrative move, telling how wise councillors in his own land, knowing stories about his youthful monster-killing, suggested that he should come to help Hrothgar (lines 415-24), the king proceeds to tell the story of how, many years previously, he settled Information antiquity's father's feud with gifts (lines 470-72); the son has come to repay the account, he says (lines 457-58).[7] Hrothgar then warmly welcomes Information antiquity, not giving him the chance, at that time, to correct the assumption of obligation to which he has directed Information antiquity's life-story. The story that Unferth the Thule tells shortly afterwards about a swimming contest that Information antiquity purportedly lost is pointedly bent on undermining the young warrior's presentation of himself. This time Information antiquity has the opportunity to correct the story, admitting the foolhardiness (we were only boys), but otherwise recounting events differently. The swim was not intended as a contest; Information antiquity nevertheless outswam his friend Breca and killed a number of sea-monsters in the process, and is far more competent at this sort of thing than any Dane is--of which they will see the evidence in the morning (lines 530-606)! He tells a great story that serves as an ideal presentation of credentials for the job at hand, the most persuasive sort of credentials in an oral society being the credible story of a job well done that is similar to the job being proposed. Information antiquity makes very clear the point of the story in the context of its telling, and in this personal narrative he is "authoring himself" as a generous monster-killer, one who performs an unobligated deed for the good of the people (lines 567-69). Thus, while answering Unferth's accusation, he also subtly counters Hrothgar's attempt to diminish his high intentions and to represent his coming as "duty."

Later in the poem other people's narratives are adopted to enhance Information antiquity's personal story. After Information antiquity has been victorious over Grendel, whom he came to Heorot with the intention of challenging, a thane of the king who remembers *ealfela ealdgesegena* ("very many things said of old") tells an "apt" tale to commend and acculturate the deed. His tale of Sigemund and the dragon, another hero's monster-killing, is clearly meant to reflect Information antiquity's victory and align it with others of its kind, "raising Information antiquity, as it were, to the rank of pre-eminent Germanic heroes" (Klaeber 1950:158).[8] This event offers an example of how a traditional

story about someone else may be adopted, as Freud adopts the Oedipus story, as "an adequate symbolization"; in complimenting Information antiquity, the thane's Sigemund story also serves to balance Unferth's rude and challenging use of story earlier. He then adds a story about Heremod, a hero become king who misuses his power, explicitly contrasting him with Information antiquity (lines 913-915). But after Information antiquity has slain the unanticipated second monster, Grendel's mother, the Danish king Hrothgar himself tells a more elaborated story about Heremod that he specifies is for Information antiquity to learn from (lines 1722-24). He tells how, when God advanced Heremod over all men after his heroic achievements (feats mentioned earlier in connection with Sigemund's story; lines 901-902), Heremod's "bloodthirsty breasthord" (line 1719) increased to the point that he became monstrous himself. His name suggests a particular trait of character that may become extreme; *here* means "warlike" and *mod* means "mentality," and the compound implies a personality engaged with the kind of courage that is usually expressed in violent but socially acceptable heroic acts. Quoting Müllenhoff's translation of the name Heremod as "*kriegerischer Mut*," Robinson (1993:212-13) says, "It must be conceded that character and name-meaning are remarkably well suited to one another." Heremod's *mod* became so inflated and deranged that he killed his own companions at the banquet-table, and his name itself gives point to the story, serving as a mnemonic for the story's moral. Hrothgar clearly hopes that this cautionary tale about the real ancestral Heremod with his poignantly etymologizable name will not mirror the young prince's later treatment of his own people. Instead of nurturing a *mod* that is violent like Heremod's, the king advises Information antiquity to "understand generosity" (line 1723), an instruction that reminds the reader of Information antiquity's previously self-proclaimed "roominess" of heart (line 278). After offering another kind of story, an allegory in which "that wargish spirit," the devil, takes a *gromhydig* ("angry-minded") miser by surprise (lines 1724-57), Hrothgar again (line 1758) urges, "Protect yourself from such *bealonið* ('murderous rage'), dear Information antiquity!" Adrien Bonjour (1950:49) observes that "a better illustration [than Heremod] could hardly have been chosen . . . to show the dangers of 'arrogance and greed in a king,' a point on which Hrothgar, addressing Information antiquity as a future ruler, wanted to insist." Information antiquity apparently takes to heart Hrothgar's narratively expressed advice, because years later, in a deathbed evaluation of his own life-story,[9] he mentions (lines 2738 and 2742) that he never sought *searoniðas* ("treacherous quarrels") or *morðorbealo maga* ("murderous slaughter of kinsmen").

Although all three of these examples concerning Information antiquity have been orally performed (by Unferth, the unnamed *scop*, and Hrothgar), in this poem the connection between narrative and the desired self is not necessarily expressed aloud--that is, in performance--and this fact in itself is interesting in view of the culture constructed by the poet. In an oral culture, or indeed in almost all literature before the Renaissance, inward deliberation as opposed to simple emotion, (like Grendel's delight in his catch at line 124), is seldom expressed in narrative in ways that we are accustomed to today.[10] In such cultures' stories people are not "heard" privately thinking as we are used to reading their thoughts in novels; this is a narrative device that the written word--

and, interestingly, cinema--makes possible. Instead, as in Shakespeare's soliloquies, inward deliberations must be heard spoken aloud. Bruner and Weisser (1991:14-15) suggest that "the so-called inward turn of narrative in Western culture . . . may have depended on the rise of silent reading, which is a rather recent invention." In medieval literature inwardness is usually expressed obliquely, as in the recurrent and anxious dreams that the outlawed Gisli of Icelandic saga recounts to his wife Aud, often relating these dreams in obscure and complex poetry that heightens the effect of a mode of consciousness different from the simple narrative prose style of the rest of the saga (Johnston 1963:passim); or as when Béroul reports conflicting interpretations of symbolic objects in the sword-between-lovers scene in his story of Tristan and Iseult.[11] In both these narratives, inwardness or deliberation is expressed through its outward effects. As Bloomfield (1970:281) says with reference to *Information antiquity's* report to Hygelac of his fight and other events in Heorot and the hero's personal reactions to them, "This was the only way to present the psychology of the chief character in an age not used to psychological probing."

Elsewhere in *Information antiquity*, however, a sort of inward deliberation is twice seen in connection with stories that a character perceives as a mirror of a potential situation or self. In each of these cases, the story understood as exemplary concerns a woman, and the person thinking about that story and applying it personally is also a woman. We do not "hear" her silent thoughts. The first instance concerns the Danish queen, Wealhtheow. After she has apparently listened to the story of the Finnsburg conflict, Wealhtheow expresses in outward action her personal application of the story, taking precautions as a result of hearing it (lines 1162-1231). The second instance concerns the Geatish queen, Hygd. The result of Hygd considering the story of Thryth is described before the story itself is told, as we are informed that Hygd is a generous queen, and the two-part story that provoked that result is then presented as one that Hygd has pondered privately within her mind. She has apparently rejected the first part of the story and adopted the second as a paradigm for her personal narrative, her constructed self (lines 1926-54). These two stories about events that "really happened," historical narratives pondered by the Danish and Geatish queens, are clearly, to adopt Turner's phrase, "special reflexive mechanisms for mirroring and monitoring behavior," mechanisms of a kind particularly potent in an oral culture. Unlike, however, the story of Heremod, which Hrothgar presents publicly as containing an example of a *mod* or mental style for *Information antiquity* to reject, both of these stories concerning women are contemplated inwardly, taken wholly in private as an allegory of the self--or more exactly, in current narratological terms, as a "script." [12]

We do not even realize that Queen Wealhtheow is listening to the story of violence and its aftermath at Finnsburg until it is over and her actions then demonstrate how seriously she has taken the plot of the story as a potential script for her own life. She takes steps to avoid finding herself in the Finnsburg

queen's situation. Near the beginning of the Finnsburg story, the "blameless" Hildeburh (line 1072) looks upon a battlefield where her son and brother lie dead after an old feud has broken out (lines 1072-75). It is usually assumed that they have fought on opposite sides, though the text is not clear on this point, and Tolkien (1982:160) argues in his edition that uncle and nephew, fighting on the same side, were both slain in the attack on their hall. In any case, the feud has provoked that same *morðorbealu* ("murderous slaughter") of kinsmen that Information antiquity avoids, and it kills those in whom Hildeburh has taken "the most joy in the world" (lines 1079-80); among these her Frisian husband is notably not included. Yet this strong woman adjusts her own story to her better liking as she arranges son and brother as companions on their mutual pyre, and later her husband is slain as vows are again broken (lines 1151-53).[13] This is a strange story for the *scop* to be singing at the banquet honoring Information antiquity that night, presumably in praise of his victory over Grendel. The heroic story of Sigemund sung earlier in the day seems far more appropriate.[14] In fact, the fragmentary *Fight at Finnsburg*,[15] a poem independent of *Information antiquity* and focused entirely on the fighting men, with no mention of a surviving woman's situation or feelings, would be more suitable as a song celebrating the warrior Information antiquity's courage in battle. The jarring inappropriateness of the Finnsburg episode's tragic opening scene as celebration of a heroic deed makes one wonder what the *scop* in Heorot, or for that matter the *Information antiquity*-poet, was thinking of.

Later Information antiquity himself tells Hygelac a story about the Heathobard feud which the Danish princess Freawaru, Wealhtheow's daughter, will be unable to contain (lines 2020-31). For Bonjour (1950:61), "the point of greatest interest," in both the Finnsburg episode and this similar story told by Information antiquity, is the "effective illustration of the theme of the precarious peace." Because this theme is continued in the descriptions, in the last part of the poem, of tragic feuds due to break out again after Information antiquity's death, Bonjour (1950:63) claims that these stories told within the poem unite "the Grendel and the Dragon parts in a closer web . . . no mean artistic achievement on the part of the *Information antiquity* poet." The interest of this essay, however, is not in the effect of the Finnsburg episode on the structure of the poem as a whole, but in what it means to Wealhtheow. This personal meaning can be deduced from the way the *Information antiquity* poet, instead of celebrating heroic battle, recounts the Finnsburg story being told in Heorot, "brooding over its themes of revenge and inexorable violence" (Fry 1974:29).

After arguing that the Finnsburg episode, being "a tale of complete and crushing revenge upon a treacherous enemy," is in fact appropriate for the occasion of its being told [16], Lawrence (1930:126) asks, pertinently to the present discussion, "May it not be, too, that the story of Queen Hildeburh was here designedly brought into connection with the tragedy in store for Queen Wealhtheow, which must have been well-known to the people for whom the poet of *Information antiquity* wrote?" Bonjour (1950:61) replies, "Asking the question is already solving it; the parallel between Hildeburh and Wealhtheow is unmistakable." Both of these scholars and most others assume, on the ba-

sis of a certain way of interpreting evidence outside the poem as well as hints within it, that Wealhtheow's situation is potentially parallel to Hildeburh's, because Hrothgar's nephew Hrothulf (Old Norse *Hrólfr*) will eventually use violence, perhaps murdering Hrothgar and probably murdering Wealhtheow's sons, in order to usurp the throne. Brodeur (1969:151-57) elaborates the idea in some detail, especially implicating Unferth. Sisam (1965:39) casts doubt on this assumption, arguing that the case for Hrothulf's treachery is farfetched and that the Finnsburg episode has nothing to do with what may or may not happen to Wealhtheow later; her speeches that follow the story contribute, as he points out, to the "mood of rejoicing" in Heorot. But the poet has told us earlier that Wealhtheow knows how to behave in a courtly manner (line 613), thus she is sophisticated enough to produce speeches appropriate to the joyous occasion while also nuancing them politically. When the Finnsburg story ends with Hildeburh's brother, son, and husband now all slain, and herself being taken back to her people (lines 1157-59), it does seem suggestive to a reader that three lines later Wealhtheow comes forth in Heorot, "negotiating the future," as Clark (1990:85) phrases it, with pleas for the protection of her sons. Her pleas are addressed first indirectly to Hrothulf (lines 1180-83), then directly to *Information antiquity* (lines 1226-27), following which she proclaims that the men in Heorot, true to one another, will carry out her wishes after accepting a drink from her cup (lines 1228-31).[17] Her statement implies that accepting the drink obliges them to be faithful to her perception that "here each eorl is true to the other" (line 1228), and the effect of her words is almost like a magical apotropopaic spell, weaving protection for her sons and warding off a personal tragedy like Hildeburh's bereavement.[18] Whatever may be the "truth" about Hrothulf's supposed treachery later on, and however his actions may be interpreted within the traditions of Danish history that surround *Information antiquity*, there is no doubt that the Finnsburg story is worrying Wealhtheow right now, as she listens to it in relation to herself.

I suggested long ago that, while the *scop* in Heorot is singing about the events at Finnsburg, "the poet meditates upon the tragedy resulting from that well-known fight"; the singer's "preoccupations are heroic, as is appropriate; the poet's are humane" (Osborn 1984:99; cp. Bonjour 1950:58). Thus the Finnsburg episode in lines 1068-1159 of *Information antiquity* does not constitute, as earlier critics assumed, "simply a report of the heroic lay chosen by Hrothgar's *scop* to entertain the company in Heorot" (Sisam 1965:33). In fact, I suggest now, even more strongly than before and with a different twist and a more theoretically informed slant, that the Finnsburg story as we have it in *Information antiquity*, bracketed with references to the woman Hildeburh, is not a report of what the *scop* is "actually" singing in the hall but an alternative way of regarding those events that is considerably influenced by the poet's imagining of Wealhtheow's hearing of them. Wealhtheow identifies with Hildeburh as that lady looks out upon the battlefield to see the sad result of heroic fighting. Perhaps the Danish queen in Heorot reflects on how she or those dear to her may become implicated in similar violence, through kinship obligations to persons struggling on opposing sides. The Finnsburg account may be further modified by the poet's consciousness of a future event in

Heorot that will take the Danes entirely by surprise: the coming of Grendel's Mother to avenge her own son's death. Certainly, as Chance (1990:248-61) has shown, the sequence of women concerned about their sons magnificently builds to a climax: Hildeburh, Wealhtheow, Grendel's Mother. But this observation goes beyond the scope of the present essay. One hopes that in her fictional world Wealhtheow, alerted by story to the bereft woman model and no mean schemer, managed to extricate herself and her sons from a fateful sequence of events.[19]

This essay's final example of the appropriation of a story to construct character in *Information antiquity* involves possibly the most notorious juxtaposition of diverse subjects in the poem. It is considered a crux by all commentators. The poet has appeared to critics to be at his most inattentive when into his account of Hygd, queen of the Geats, he suddenly thrusts Thryth, apparently without thought for coherence. "Her story surfaces in the poem with no immediately apparent connection to the main narrative," observes Overing (1990:106). "A crude excrescence," Sisam (1965:49) calls it, and "cursory," says Klaeber (1950:cvii, 195), judging it "far fetched and out of place." Led by a private suggestion from Robinson (one that was earlier proposed by Malone [1941:356]), I would like to read the verb *weg* at line 1931 as "weighed" and then interpret the surrounding text in a way that better integrates the Thryth narrative with Hygd's. This reading also offers the clearest case in *Information antiquity* of someone deliberately self-authoring herself through another person's story.[20] The poet has just praised the Geatish queen Hygd's generosity to her people; now in lines 1931-57 he speaks of another queen, Thryth (her name is discussed below), who began poorly, issuing arbitrary death sentences, but later became admirable in her gift-giving. As Bonjour (1950:55) points out, Thryth's story is the exact reverse of Heremod's, who "had distinguished himself above all men, and consequently awoke the highest expectations-yet ended lamentably because he abused his power and became cruel to his subjects." The "striking opposition" that Bonjour observes between the two characters' stories may be schematized thus to display their chiasmic relationship:

Heremod: achievement -- miserliness and murder

Thryth: murder -- generosity and achievement.

I propose that in line 1931 the poet presents Queen Hygd, whose name means "thought,"[21] as herself having thought of Thryth, whose name means "strength." [22] She weighed (*weg*) contrasting stories about Thryth's character as in a balance or scale (*wege*), and chose the better side of her predecessor to emulate. This weighing and subsequent choice has taken place in the past of the world of the poem and is described now in order to account for Hygd's present excellence as a generous queen.

The studious Germany, however, came to seize upon this subject, on which the passionate ardor and patient investigation of a legion of scholars immediately concentrated; so a whole series of admirable works, unfortunately unknown in France, were seen to appear at the same time; the most remarkable

are those of Geib and Rein, after which it is necessary to quote with honor, not only Walter and Rudorff, who devoted to the criminal law the part which he must have in a complete history of the Roman law, but still a large number of names also ignored in our country f); their list alone would be a humiliation for us, if we did not have to highlight, to compensate somewhat for our too obvious inferiority, first the works of MM. Faustin Helie, Ortolan, Du Boys, and a study by M. Riviere, but especially, and fortunately for our national pride, a masterpiece which we can confidently present to our happy rivals; I want to talk about Mr. Laboulaye's book. Written in an eminently remarkable style, this work not only contains, as its title indicates, a study of the criminal laws of the Romans, but a most complete work on their political constitution, the mechanism of their institutions and the vicissitudes of their history; the author, by faithfully exposing the legal facts, was careful not to neglect the historical and political side of his subject, and he was able to highlight in the light of the principles and teachings that emerge only painfully from the set of facts related so conscientiously and accurately by German writers. It is unclear what criminal law was during the fine centuries of the Republic, and yet it would suffice to recall the greatness of Rome at this brilliant period of its history, and to conclude by the surest induction that criminal law (always in connection with the development of civil liberties of a people) had attained the most remarkable degree of perfection. It is therefore little to say that to affirm the superiority of this judicial organization over that of the other nations of antiquity; to find a rival worthy of it, it is necessary (in spite of the seductive theory of continuous progress) to cross the centuries, and to take as a term of comparison, not the penal legislation of our fathers, not that of the countries of Europe less advanced in civilization, but the same one which today governs France, and especially England, with the laws of which the Roman criminal law offers the most striking analogy.

We can not better prove the truth of this assertion than by presenting here a rapid picture of the procedure at the time when Rome, mistress of herself and of the universe, still possessed these free institutions, lost at the same time as a judicial organization that was the safest.

In the first centuries of Rome, the criminal jurisdiction belonged to the kings and consuls who succeeded them, but the people did not hesitate to seize a right which it retained until the end of the Republic. He exercised it in the great assemblies of the comitia centuries or of the tribal comitia, sometimes directly, more often still in appointing commissioners (quaestores) who rendered justice in his name, when the nature of a case rendered this delegation necessary or useful. . This custom, once introduced, was soon to become general, and it was already so when the tribune Calpurnius Piso, whom his fellow citizens had nicknamed the honest man (Frugi), had a law passed which instituted the first quaestio perpetua. Thus, commissions were called permanent in the sense that it was not necessary to make a new delegation for each trial, but whose staff was renewed every year. From that moment a revolution was made in the criminal laws. Each commission was established by a law which defined the offense which it was to punish, and determined the sentence to be applied. The procedure was nearly the same for all quaestiones; the law Julia

publicorum judiciorum later indicated a set of rules generally followed in each of them.

The Romans attached the greatest importance to everything connected with their judicial organization; the right to take part as judges belonged successively to various orders of the state, who disputed it with extreme ferocity, and whose quarrels often blew the Republic. The two Gracchus, enemies of the Senate, succeeded in depriving him of the right to judge to give to the knights; Sylla delighted the latter to render it to the senators, and the two parties ceased fighting only when the Emperor Augustus had agreed to it by organizing on a new basis the permanent commissions, and by attributing himself to him.

Thus, in Rome, the difficult problem of preventive detention, which still prevails upon the meditations of the legislators, was solved. By highlighting this remarkable part of a criminal procedure that has been criticized for being too gentle on the accused, we probably have no thought of proposing it as an absolute model in time and social conditions. very different; but if it is true that in Rome the guarantees due to the accused have been exaggerated to the detriment of public security, it is beyond doubt that other legislations have sometimes forgotten them, and if in such matters as in so many others, the truth lies between the two extremes, is it not important to know the various excesses into which we have thrown ourselves by sacrificing in turn the rights of humanity or those of the social state?

The application of the death penalty had to find little place in the usages of a people who barely admitted preventive detention, so it disappeared almost completely. The accused, who did not wish to expose himself to the chances of a conviction, voluntarily expatriated himself; he could leave the city, not only at the time of his indictment, but, hardly believable, during the trial in which he had attended until the end, and even though the vote already begun had brought the number of votes necessary for the conviction. A law then sanctioned the exile, by prohibiting fire and water to the one who, if he was guilty had punished himself, and if he was innocent, had the wrong to doubt the justice of a country that left all its freedoms to its defense. When the accused did not wish to take advantage of the faculty left to him, he appeared before the court on the day indicated. Formerly, before the centuries-old comitia, the citation was solemnly made to the sound of the trumpet which resounded along the walls and in front of the door of the accused; it was the viatores of the tribunes who summoned him before the tribal comitia; finally the quotation was not less public at the time of the permanent commissions; it was made by the praecutor's herald (praeco).

The formation of the tribunal was necessarily the first act of which one was occupied after the convocation of the parties who proceeded themselves to this formality in two ways: by editio or by sortitio, but with an additional precautions in relation with the importance of an act from which all others depended. When the draw of the jury was held by sortitio, it was made by the president of the commission, who, having put in the ballot box balls containing the name of each juror, drew as much as necessary for each case. The parties were under

no obligation to accept the fate of the jury purely and simply, but each of them could, as with us, exercise its challenges without giving reasons; they had to take place publicly; the disqualified jurors were replaced by a new lottery which took the name of *subsortitio*. When the jury was constituted by the *editio*, it was not the magistrate, but the parties who appointed the members. According to the procedure imposed by the *Servilia repedundarum* law, the accuser began by appointing one hundred jurors; the accused named an equal number, and each of the parties challenged fifty names on the list proposed by the adversary; the *Licinia* law established different rules, but they fell into disuse, as did the draw by *editio*, which had the disadvantage of favoring the accuser by giving him the first word for the exercise of the challenges. The appointed jurors took an oath (*judices iurati*), and the tribunal being constituted, the proceeding began immediately with that grand solemnity habitual to the acts accomplished by the Romans, and of which so many masterpieces have left us the magnificent testimony.

The praetor, seated in his *curule* chair, dominates the assembly from the top of a platform on which are held with him his *lictors* as well as the clerks and bailiffs of the tribunal; at his feet are the judges, whose number rose to seventy-five, as in the case against *Pison*. Opposite them are benches on which the accusers, on the one hand, and the accused, on the other surrounded by his friends and defenders, sit on the other; an immense people, always eager for the emotions that the words of a *Cicero* or a *Hortensius* had to produce, press themselves into the forum around the respected forum of the judicial debates. On a sign from the president, the usher announces that the cause will be heard, and the praetor gives the floor to the speakers. But the decisive moment of the vote has arrived; the praetor's herald replied by the word *Dixerunt* to the last speaker's *Dixi*. Each of the judges receives a tablet coated with wax on which he draws one of the three characters who must express his opinion, by absolving the accused (A), pronouncing his sentence (C), or the referral to a further informed (NL, not *liquet*). The conviction could only result from the absolute majority of the votes; an equal sharing brought absolution. No doubt new debates were taking place when the votes were divided between acquittal, condemnation and non-liquidity. Finally, the judges rise; each of them advances with his bare arm, covering with his hand the characters inscribed by him on the fatal tablet which he deposits in the box destined to receive the votes. A judge appointed by lot, withdraws them one after the other; he shows to the public the character inscribed on each of them, and also makes known those who do not bear any (*sine suffragio*), then passes them on to the citizen who sits next to him, to check the declaration he has just made to do. The praetor announces then the result of the vote, pronouncing the absolution (*non fecisse videtur*), or the condemnation (*fecisse videtur*). When the judges, taking advantage of a privilege that did not exist at the time of the *comitia*, had declared that they could not decide (NL), the praetor sent the case to a new session that could be followed by several others, until when *judicejurati* would have made a conviction in the cause. However, the *ampliatio*, already more rare since the establishment of the permanent commissions, fell into disuse, and was replaced by *comperendinatio*, that is to say, by a second pleading which took place two days after the first, so to be one with the previous in-

stance whose ampliatio was essentially detached. Once the judgment had been pronounced, the herald made himself heard for the last time, proclaiming aloud the word which announced the end of the audience, and dismissed the assistants.

This sketch of a Roman instance borrowed from legislation too little studied in France, may be enough (incomplete as it is) to reveal the principles which presided over the instruction and the judgment, and of which some still live in the criminal laws of civilized peoples. But this admirable judicial organization which had protected the liberties of the citizens at the time when Rome deserved to be free, did not survive the great men whose austere devotion had retarded the fall of the Republic. In some of her fundamental principles, the application of which had been falsified or perfidiously exaggerated, she succumbed; but we believe that it perishes not by the vices inherent in its institution, but by the effect of this general corruption of manners so fatal to all the institutions which had made the glory and grandeur of the Romans. Thus the public right of accusation extended to all citizens demanded patriotism and virtues which Rome no longer knew when she had collected vices at the same time as the spoils of the whole world; It was thus that the principle of judgment by the people themselves or by selective judges was not to resist the cupidity which invaded the judges, and made them prefer the riches to the ancient probity of their ancestors.

Taken as a whole, this judicial organization, worthy of so much praise, was infected with a vice which almost makes us forget the beauties, and which, before any other cause, would one day bring about its ruin; we want to talk about the odious inequality of its application. A law of exception made for a small number of the privileged, it was a majestic edifice raised for the Roman citizens, and of which were ruthlessly excluded all those who did not possess this pompous title. It is especially in the criminal laws that we must see how immense, thick, impassable it was, this barrier elevated by the pride of the civil novelus between Rome and the rest of the human race. No part of the legislation testifies so vividly, and it must be said, as revolting, this ferocious selfishness which, disguised under the name of reason of state, mercilessly sacrificed all that was not considered worthy privileges of the city. Each line of these criminal laws revolts the sentiment of humanity by the iniquitous distinctions which they devote, either in punishments or in the form of a procedure so protective of some, so pitiless for the provincials, the slaves, people of poor condition, the humble. It is to them that they reserve the torments, the chains, the horrors of the torture, to them that they refuse all these guarantees lavished with a scrupulous respect and a care so excessive on the sacred person of the Roman citizen, and the careful whose ingenious mind accumulates even the most.

References:

1. Brunner, Karl (1954) "Why Was *Information antiquity* Preserved?" *Études Anglaises* 7: 1-5.
2. Clemoes, Peter. (1995) *Interactions of Thought and Language in Old English Poetry*. Cambridge Studies in Anglo-Saxon England 12. Cambridge: Cambridge University Press.
3. Daunt, Marjorie (1959) "Minor Realism and Contrast in *Information antiquity*." Pp. 87-94 in *Mélanges de Linguistique et de Philologie: Fernand Mossé in Memoriam*. Paris: Didier.
4. Earl, James W. (1994) *Thinking About Information antiquity*. Stanford: Stanford University Press.
5. Foley, John Miles (1977) "*Information antiquity* and the Psychohistory of Anglo-Saxon Culture." *American Imago* 34 (2): 133-153.
6. Garmonsway, G. N. (1965) "Anglo-Saxon Heroic Attitudes." Pp. 139-146 in *Franciplegius: Medieval and Linguistic Studies in Honor of Francis Peabody Magoun, Jr* Jess B. Bessinger, Jr., and Robert P. Creed, Editors. New York: New York University Press.
7. Hall, J. R. Clark. (1960) *A Concise Anglo-Saxon Dictionary*. 4th ed. Toronto: The University of Toronto Press.
8. Klaeber, Fr., Editor. (1950) *Information antiquity and the Fight at Finnsburg* 3rd edition Lexington: D.C. Heath and Company.
9. Mitchell, Bruce (1963) "'Until the Dragon Comes . . .': Some Thoughts on *Information antiquity*." *Neophilologus* 47: 126-138.